In the

Supreme Court of the United States

October Term, 1970

No. 70-179

Jesse S. Lombardino,

Petitioner,

—v.—

Louis A. Heyd, Jr., Criminal Sheriff,

Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM FOR PETITIONER

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This reply memorandum is addressed solely to the question of mootness raised in the respondent's brief in opposition. While the petitioner adverted to this issue in the *certiorari* petition at page 4, footnote 1, we would elaborate on that discussion.[1]

As a consequence of the revocation of probation, the petitioner was incarcerated when he filed his habeas corpus application in the District Court. State remedies had already been exhausted. He remained in confinement dur-

[1] The respondent's arguments on the substantive issue—whether evidence seized in violation of the Fourth Amendment is admissible in a probation revocation proceeding—were anticipated in the original petition.

ing and following his appeal to the Fifth Circuit. He was released on parole shortly before the filing of the petition for *certiorari*. The question then is whether release from confinement pending review in this Court renders moot petitioner's challenge to the revocation of probation which caused that confinement.

In parallel situations, this Court has held that so long as there is even a "mere possibility" that adverse legal consequences will flow from a conviction, the case is not rendered moot. See *Sibron* v. *New York*, 392 U.S. 40 (1968); *Carafas* v. *La Vallee*, 391 U.S. 234 (1968). Lower courts have applied this principle to allow other challenges to probation revocation proceedings even though the petitioner had been released from confinement during the federal habeas corpus action. The Fourth Circuit, in *Hewett* v. *State of North Carolina*, 415 F.2d 1316 (1969) heard challenges to probation revocation proceedings, on the ground that the right to counsel had been denied, even though both petitioners were no longer confined. Reasoning from *Sibron* and *Carafas*, the court found two sets of possible adverse legal consequences which lingered after confinement. First, revocation of probation affected the time when the petitioners could seek restoration of civil rights under North Carolina law. Second, if the petitioners were subsequently convicted, the sentencing judge "would be bound to be influenced by that petitioner's prior probationary experience." 415 F.2d at 1322. The identical situation was considered by the Seventh Circuit in *Hahn* v. *Burke*, 430 F.2d 100 (1970), *cert. denied*, 28 L. Ed.2d 868 (1971). Confinement had terminated, but the challenge to the probation revocation was held not to be moot:

> The probation revocation affixes a permanent blemish to petitioner's record. If petitioner ever has future difficulties with the law in Wisconsin, the judge could take into account the fact that petitioner's probationary status was at one time revoked. 430 F.2d at 102.

Accord, Scarpelli v. *Gagnon,* 317 F. Supp. 72 (E.D. Wis. 1970). Petitioner submits that these decisions correctly apply the policies identified in *Sibron* and *Carafas* and support the argument that the case is not moot.

Respectfully submitted,

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